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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43430
Plaintiff-Respondent,)	
)	Jerome Co. Case No.
v.)	CR-2013-317
)	
MELVIN ARTHUR McCABE,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME**

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Melvin Arthur McCabe appeals from the district court's order denying his Rule 35 motion to correct an illegal sentence, arguing that, under the facts of this case, he should be exempted from the law of the case doctrine.

Statement Of The Facts And Course Of The Proceedings

On direct appeal from McCabe's underlying criminal case in State v. McCabe, Docket No. 41357, 2014 Unpublished Op. No. 789 (Idaho App., October 30, 2014), the Court of Appeals related the following factual background:

While arresting McCabe for driving without privileges, an officer found a cigarette pack containing methamphetamine on McCabe's person and various drug paraphernalia in his vehicle. McCabe was charged with possession of a controlled substance with the intent to deliver, driving without privileges, possession of drug paraphernalia, failure to provide proof of insurance, and being a persistent violator. The State later filed an amended information, charging an enhancement under Idaho Code § 37-2739 based on McCabe's prior misdemeanor conviction for possession of drug paraphernalia.

McCabe was appointed counsel, who, upon McCabe's request, filed a motion to withdraw. The district court denied the motion and McCabe pled not guilty. McCabe's counsel filed a second motion to withdraw, and after conducting a *Faretta* inquiry, the district court determined that McCabe made a "free and voluntary decision to represent himself" and allowed counsel to withdraw.

McCabe pled guilty to an amended charge of possession of a controlled substance, I.C. § 37-2732(c)(1), and the section 37-2739 enhancement, in exchange for dismissal of the remaining counts and an agreement to recommend a unified sentence of fourteen years, with six years determinate. The district court imposed the sentence recommended by the State. McCabe filed a timely notice of appeal and then filed an Idaho Criminal Rule 35 motion for reduction of sentence, which the district

court denied without a hearing. McCabe filed a motion to withdraw his guilty plea and a motion for a retroactive competency hearing, arguing, in relevant part, that he was under the influence of methamphetamine such that he was unable to knowingly and intelligently waive his right to counsel and to enter a guilty plea. Following a hearing, the district court denied both motions.

Id. at 1-2 (footnote omitted). McCabe appealed, arguing that the district court abused its discretion by “failing to sua sponte order a mental health evaluation to determine his competency to represent himself” and “by denying his post-sentencing motion to withdraw his guilty plea and to order a retroactive competency evaluation.” Id. at 2. The Court of Appeals affirmed “McCabe’s judgment of conviction for possession of a controlled substance, and attendant sentencing enhancement, entered upon his guilty plea.” Id. at 10.

While his appeal was pending, McCabe filed a Rule 35 motion for sentencing reconsideration (41357 R., pp.461-65), which the district court denied (id., pp.468-73). The following year, McCabe filed a Rule 35 motion to correct an illegal sentence, arguing as he had in his previously filed Rule 35 motion that his prior conviction for possession of paraphernalia, I.C. § 37-2734A, did not count as a prior offense under the Uniform Controlled Substance Act, and therefore could not be used to enhance his sentence. (Compare R., pp.6-36 with 41357 R., pp.461-65.) The district court denied McCabe’s motion noting that it had “previously decided the applicability of the sentencing enhancement for a prior violation of the Uniform Controlled Substance Act, I.C. § 37-2739[,] when it denied the defendant[’]s Rule 35 Motion....” (R., pp.37-39.)

McCabe timely appealed from the district court’s order denying his second Rule 35 motion. (R., pp.41-43.)

ISSUES

McCabe states the issues on appeal as:

1. Should the law of the case doctrine be modified to allow issues which could have been but were not raised in a previous appeal to be raised in a second proceeding when the failure to do so would result in an obvious injustice and the opposing party would suffer no prejudice?
2. Is the 14-year indeterminate sentence here illegal because a sentence for a felony controlled substance conviction may not be enhanced by a prior misdemeanor possession of drug paraphernalia conviction under I.C. § 37-2739?

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. In what he styled a Rule 35 motion to correct an illegal sentence, McCabe in fact challenged his conviction, entered upon his guilty plea for a second or subsequent offense enhancement, under Idaho Code § 37-2739. Was the district court without jurisdiction to consider an untimely challenge to McCabe's conviction?
2. If this Court reaches the merits of McCabe's claim, has he failed to show that a conviction for possession of paraphernalia in violation of the Uniform Controlled Substances Act is insufficient to enhance a subsequent violation of the act under Idaho Code § 37-2739?

ARGUMENT

I.

The District Court Was Without Jurisdiction To Consider McCabe's Untimely Challenge To His Conviction

A. Introduction

In his underlying criminal case, in exchange for the dismissal of several charges, McCabe pleaded guilty both to possession of methamphetamine under Idaho Code § 37-2732(c), and to an enhancement under Idaho Code § 37-2739 for having a previous conviction under the Uniform Controlled Substances Act. (41357 5/13/2013 Tr., p.23, L.3 – p.24, L.19.) Several months after the remittitur entered in his unsuccessful appeal, McCabe filed what he styled a Rule 35 motion to correct an illegal sentence (R., pp.6-36), which was subsequently denied (R., pp.37-39).

McCabe's argument in his so-called Rule 35 motion only indirectly challenged his sentence. Instead, McCabe argued that "a misdemeanor conviction may not be used to increase the maximum term for a subsequent felony controlled substance sentence under I.C. § 37-2739." (Appellant's brief, p.10 (summarizing McCabe's argument from his Rule 35 motion).) This is not a challenge to his sentence, but a challenge to his conviction on the enhancement, based on a theory that he is legally innocent of the enhancement. But McCabe waived his right to have his guilt or innocence determined when he pleaded guilty to the enhancement. His challenge to his conviction is thus an attack on his guilty plea, on the ground that the plea lacked a sufficient legal basis. This challenge cannot overcome two procedural bars: First, the district court lacked jurisdiction to hear McCabe's challenge to his underlying conviction which became final long before the present action. Second, McCabe's challenge is barred by the doctrine

of *res judicata* because the validity of McCabe's guilty plea was already adjudicated in his prior appeal, and whether McCabe's prior paraphernalia conviction could be used to enhance his subsequent conviction for possession of methamphetamine is an issue that has previously been finally decided by the district court.

Finally, even if McCabe's argument were the proper subject of a Rule 35 motion and not barred by *res judicata*, it still fails on the merits because on its face there is nothing illegal about the unified sentence of 14 years with six years fixed imposed upon McCabe's guilty pleas to both possession of methamphetamine and the subsequent conviction enhancement under Idaho Code § 37-2739. The district court's order denying McCabe's motion should be affirmed.

B. The District Court Lacked Jurisdiction To Consider McCabe's Challenge To His Conviction Under Idaho Code § 37-2739

While Idaho Criminal Rule 35(a) allows a court to correct an illegal sentence at any time, this is not a mechanism to challenge an underlying conviction. See State v. Warren, 135 Idaho 836, 841-42, 25 P.3d 859, 864-65 (Ct. App. 2001). As noted above, McCabe's challenge in what he styled his Rule 35 motion was to his conviction, not his sentence. McCabe's challenge to his conviction fails because it was untimely and the district court therefore lacked jurisdiction to consider it. "Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003). Whether a court has jurisdiction is a question of law, given free review. State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003).

The proper vehicle through which to challenge a conviction entered upon a guilty plea is a Rule 33(c) motion to withdraw that guilty plea. A district court may rule upon a motion to withdraw a guilty plea at any time until the finality of judgment. State v. McAmis, 156 Idaho 55, 56, 320 P.3d 446, 447 (Ct. App. 2014) (citations omitted). McCabe's judgment became final upon its affirmance following his appeal. I.A.R. 38(b); Jakoski, 139 Idaho at 355, 79 P.3d at 714. His challenge to his conviction under Idaho Code § 37-2739 was therefore untimely and the district court lacked jurisdiction to address that challenge.

C. McCabe's Challenge To His Conviction Under Idaho Code § 37-2739, Entered Pursuant To His Guilty Plea, Is Barred By The Doctrine Of *Res Judicata*

Even if the district court had jurisdiction to consider McCabe's challenge to his conviction, that challenge would still fail under the doctrine of *res judicata* because whether McCabe was entitled to withdraw his guilty plea was previously raised to and decided by the Court of Appeals, and whether McCabe's prior paraphernalia conviction could be used to enhance his subsequent possession of methamphetamine conviction was previously raised to and decided in a final order by the district court. The question of whether an action is barred by the doctrine of *res judicata* is also a question of law over which an appellate court exercises free review. State v. Rhoades, 134 Idaho 862, 11 P.3d 481 (2000).

The doctrine of *res judicata* prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. Rhoades, 134 Idaho at 863, 11 P.3d at 482. Similarly, claims which could have been raised to the Court previously but were not are barred in subsequent

litigation by the principles of *res judicata*. Aragon v. State, 114 Idaho 758, 766, 760 P.2d 1174, 1182 (1988).

The doctrine of *res judicata* applies on two grounds to McCabe's challenge to his conviction. First, on McCabe's prior appeal in Docket No. 41357, he argued that he was entitled to withdraw his guilty plea. See State v. McCabe, Docket No. 41357, 2014 Unpublished Op. No. 789, pp.2, 8-10 (Idaho Appeals, October 30, 2014). The Court of Appeals determined that he was not. See id. at 8-10. Because this issue has been raised to and decided by the Court of Appeals previously—even if McCabe's current *argument* in relation to that issue was not—it is barred under the doctrine of *res judicata* and is not properly brought before this Court.

Second, in a Rule 35 motion filed by McCabe in his underlying case with his direct appeal pending, he presented an argument virtually indistinguishable from the argument he now presents in this appeal. (See 41357 R., pp.461-65.) The district court rejected McCabe's argument and denied his Rule 35 motion. (*Id.*, pp.468-73.) McCabe never appealed from that order, and so it became final either 42 days after its issuance, I.A.R. 14(a), or no later than the 21 days following the affirmance of his conviction in his prior appeal, I.A.R. 38(b). Because the very argument McCabe now raises to this Court has already been decided in a final order, it is barred under the doctrine of *res judicata* and is not properly brought before this Court.

On appeal, McCabe asserts that the law of the case doctrine should be modified in his particular case, claiming that it creates an unjust result. (Appellant's brief, pp.4-9.) In its ruling on McCabe's so-called Rule 35 motion, the district court claimed that the law of the case doctrine barred re-litigation of whether the enhancement applied to McCabe,

noting that it had “previously decided the applicability of the sentencing enhancement for a prior violation of the Uniform Controlled Substance Act” when it denied McCabe’s prior Rule 35 motion. (R., p.39.) As noted above, where an issue has previously been decided in a final judgment, re-litigation between the same litigants is barred by the broader doctrine of *res judicata*, not merely law of the case. McCabe has not argued any basis for why *res judicata* should not apply to this case.

D. Even If Deemed A Proper Challenge To His Sentence Under Rule 35, McCabe Has Still Failed To Show That His Sentence Is Illegal On Its Face

Finally, even if this Court were to deem that McCabe’s challenge to his conviction under Idaho Code § 37-2739 were a proper challenge to the legality of his sentence under Rule 35, and one not barred by *res judicata*, it would still fail because McCabe has failed to show that his sentence is illegal on its face. As with jurisdictional claims and issues of *res judicata*, “it is a question of law as to whether a sentence is illegal or was imposed in an illegal fashion, and this Court exercises free review over questions of law.” State v. Lute, 150 Idaho 837, 839, 252 P.3d 1255, 1257 (2011) (citing State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009)).

Idaho Criminal Rule 35(a) is a narrow rule that allows a trial court to correct a sentence that is illegal from the face of the record at any time. Clements, 148 Idaho at 84, 218 P.3d at 1145. “[T]he term ‘illegal sentence,’ as utilized by I.C.R. 35(a) is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” Id. at 86, 218 P.3d at 1147. Rule 35(a) “is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal.” Id. (citation omitted). “[R]ather,

the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive.” Id.

In his underlying criminal case, in exchange for the dismissal of several other charges, McCabe pleaded guilty to both possession of methamphetamine in violation of Idaho Code § 37-2732(c)(1), and to the enhancement under Idaho Code § 37-2739. (41357 5/13/2013 Tr., p.16, Ls.6-21; p.23, L.3 – p.24, L.19.) By pleading guilty to the enhancement, McCabe agreed that his conviction for possession of methamphetamine was a “second or subsequent offense” under the Uniform Controlled Substances Act. A conviction under Idaho Code § 37-2739 generally gives the district court discretion to double the authorized sentence on a subsequent violation of the Uniform Controlled Substances Act. I.C. § 37-2739(a). The authorized sentence on a conviction for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). Therefore, McCabe’s convictions, entered upon his guilty pleas to both possession of methamphetamine and the enhancement, gave the district court discretion to sentence him to a unified term of up to 14 years.

The district court sentenced McCabe to a unified term of 14 years with six years fixed. (41357 R., pp.431-36.) That sentence is within the statutory limits. It is therefore not an illegal sentence on its face, and McCabe has failed to show error in the district court’s ultimate denial of this Rule 35 motion.

II.

McCabe Has Failed To Demonstrate That A Conviction For Possession Of Paraphernalia In Violation Of The Uniform Controlled Substances Act Is Insufficient To Enhance A Subsequent Violation Of That Act Under Idaho Code § 37-2739

A. Introduction

On the merits, though recognizing that Idaho Code § 37-2739 is unambiguous, McCabe nevertheless claims that the statute should be interpreted to disallow using a prior misdemeanor conviction for possession of paraphernalia to enhance a subsequent felony conviction for possession of methamphetamine. (Appellant's brief, pp.9-16.) The district court, when it previously addressed McCabe's arguments, held that, because possession of paraphernalia is a violation of the Uniform Controlled Substances Act, McCabe's later conviction for possession of methamphetamine was a subsequent conviction under the act and the enhancement under Idaho Code § 37-2739 applied. (41357 R., pp.471-72.) The issue is controlled by the plain language of Idaho Code § 37-2739. Correct application of that statute shows no error by the district court.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004).

C. A Prior Conviction For Possession Of Paraphernalia In Violation Of The Uniform Controlled Substances Act Is Sufficient To Enhance A Subsequent Violation Of That Act For Possession Of Methamphetamine Under Idaho Code § 37-2739

The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010). Because "the best guide to

legislative intent” is the words of the statute, the interpretation of a statute must begin with the literal words of the statute. State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). Where the statutory language is unambiguous, a court does not construe it but simply follows the law as written. McLean v. Maverik Country Stores, Inc., 142 Idaho 810, 813, 135 P.3d 756, 759 (2006).

Idaho Code § 37-2739 of the Uniform Controlled Substances Act is unambiguous and provides:

(a) Any person convicted of a second or subsequent offense under this act, who is not subject to a fixed minimum term under section 37-2739B, Idaho Code, may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this act or under any statute of the United States or any state relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs.

On June 12, 2013, McCabe was convicted of possession of methamphetamine in violation of Idaho Code § 37-2732(c) of the Uniform Controlled Substances Act. (R., p.37.) Consistent with subsection (a) of Idaho Code § 37-2739, possession of methamphetamine is not “subject to a fixed minimum term” under Idaho Code § 37-2739B. See I.C. § 37-2732(c)(1). McCabe’s conviction was a “second or subsequent offense” because on October 20, 1997, “prior to his conviction of the offense,” McCabe was convicted of possession of paraphernalia in violation of Idaho Code § 37-2734A of the Uniform Controlled Substances Act. (See 41357 R., p.405.) Under the plain language of the statute, the enhancement applies to McCabe’s sentence and the district court was correct to reject his Rule 35 motion.

McCabe's argument on appeal boils down to his assertion that paraphernalia is unrelated to "narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs." (Appellant's brief, pp.9-16.) This argument fails for two reasons: First, as recognized by the district court, the "related to" qualifies convictions from foreign jurisdictions, not convictions under Idaho's Act. (41357 R., pp.471-72.) This provision fulfills the function of ensuring that judgments of conviction from other jurisdictions would likewise constitute convictions under Idaho's Uniform Controlled Substances Act.

Second, even if the "related to" qualifier also applied to convictions "under this act," it would still apply to convictions for possession of paraphernalia in Idaho. To support a conviction for possession of paraphernalia in Idaho, the state must prove that the items were used or possessed with intent to use to "plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." I.C. § 37-2734A(1). In other words, if the items are wholly unrelated to controlled substances, their possession is not a crime in the state of Idaho.

To support his argument, McCabe relies on the South Carolina Supreme Court's opinion in Berry v. State, 675 S.E.2d 425 (S.C. 2009). McCabe's reliance may be misplaced. First, where the statutory language is plain and unambiguous, this Court is bound by that language. Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011). Other court's interpretations are irrelevant.

Second, the opinion in Berry was based on the South Carolina legislature's "unambiguously expressed legislative intent." See id. at 426. Within a year of that

court's opinion, during the 2010 legislative session, the South Carolina legislature codified the court's understanding and clarified its intent through amendment to the statute. Following the amendment, South Carolina's statute now expressly limits its scope to offenses involving marijuana or other controlled substances, not all violations of the act. See South Carolina § 44-53-470 (2010). The Idaho Legislature, by providing that all prior convictions under the Uniform Controlled Substances Act may be used to enhance a second or subsequent conviction, has not demonstrated a similar intent as that of South Carolina.

Finally, the state recognizes that when the Idaho legislature adopts statutory provisions which were previously enacted by other jurisdictions, absent an expression of legislative intent to the contrary, it is presumed to have also adopted the interpretation of those provisions up to the date of their adoption. Odenwalt v. Zaring, 102 Idaho 1, 5, 624 P.2d 383, 387 (1980) (citations omitted). But the South Carolina Supreme Court's 2009 interpretation of its uniform controlled substance act's enhancement statute comes long after Idaho's 1971 adoption of the Uniform Controlled Substance Act and its 1980 adoption of the statute criminalizing the possession of paraphernalia under that act. South Carolina's interpretation of its act is not entitled to special preference.

Under the plain language of the statute, the enhancement applies to any offender who has "at any time been convicted under this act." Because McCabe's prior conviction for possession of paraphernalia is a violation of the Uniform Controlled Substances Act in the state of Idaho, McCabe's later conviction for possession of methamphetamine is "a second or subsequent offense under this act," and he was

properly convicted of the enhancement under Idaho Code § 37-2739. The district court correctly interpreted the statute. Its order should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying McCabe's Rule 35 motion for correction of an illegal sentence.

DATED this 18th day of May, 2016.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of May, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
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at the following email addresses: db@nbmlaw.com and lm@nbmlaw.com.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd